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No. 86-1654

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PAUL ROBINSON, *et al.*,
Petitioners,
v.
STATE OF NEW JERSEY, *et al.*,
Respondents.

JOSEPH W. ANTONACCI, *et al.*,
Petitioners,
v.
STATE OF NEW JERSEY, *et al.*,
Respondents.

ALLEN OLSEN, *et al.*,
Petitioners,
v.
COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION OF THE RESPONDENT EMPLOYEE ORGANIZATIONS

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QUESTIONS PRESENTED

I. Whether the representation fee provisions of the New Jersey Employer-Employee Relations Act are unconstitutional on their face even though the state's highest court has held that the Act is to be interpreted and applied in a manner that is consistent with all of the requirements of the Federal Constitution.

II. Whether the district court abused its discretion when it abstained from deciding the constitutionality of the particular demand-and-return systems adopted by the respondent employee organizations and instead stayed proceedings to allow for the resolution of unsettled questions of state law in state tribunals.

III. Whether the tripartite structure of the New Jersey Appeal Board, whose members are appointed by the Governor with the advice and consent of the State Senate, is unconstitutional under the Due Process Clause or the First Amendment.

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ARGUMENT

The petition for *certiorari* in this case is a tangled set of assertions that the courts below erred in numerous ways. It is quite beyond our ability to place these assertions in any rational order within the limited confines of a brief in opposition. We therefore believe that it would be most helpful to the Court to describe the New Jersey statute at issue here, to outline the challenges to that statute raised by the petitioners in the court of appeals, and to set out the eminently sound disposition of those challenges by that court. This recitation, we believe, is more than sufficient to demonstrate that the decision below is correct and that further review by this Court is unwarranted.

1. The New Jersey Employer-Employee Relations Act allows public employers and employee organizations to include in a collective bargaining agreement a provision requiring nonmember employees to pay "a representation fee in lieu of dues for services rendered by the majority representative." N.J.S.A. 34:13A-5.5a (App. 278a). This representation fee may not exceed 85 percent of regular membership dues. N.J.S.A. 34:13A-5.5b (App. 278a). In addition, the statute provides that "the representation fee in lieu of dues shall be available only to a majority representative that has established and maintained a demand and return system" covering union expenditures for "benefits available only to members" and for "activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment." N.J.S.A. 34:13A-5.5c & 5.6 (App. 278a-279a). The union demand and return systems must provide for "full and fair proceedings," and include as their terminal step "an appeal to a board consisting of three members to be appointed by the Governor, by and with the advice and consent of the Senate." N.J.S.A. 34:13A-5.6 (App. 280a). The decisions of this board are subject to review by appeal to the state courts.

2. In the district court, the petitioners challenged the New Jersey statute on a wide variety of constitutional grounds. Many of these challenges were conclusively rejected in prior phases of this litigation, *see Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1228 (1985), and the case was then remanded to the district court to consider the petitioners' challenge to the constitutionality of the statute on its face and as applied. The district court rejected the facial challenge, App. 35a-58a, and abtained on the challenge to the statute as applied, App. 60a-65a. In the court of appeals, the petitioners raised three "principal issues," which the court below described as follows:

> First, they maintain that the Act's demand and return scheme facially violates the first amendment, relying on the Supreme Court's recent holding in *Chicago Teachers Union Local No. 1 v. Hudson*, 106 S. Ct. 1066 (1986). Second, they contest the district court's ruling to abstain from deciding their as-applied challenge to the demand and return systems established by the union appellees. Third, they challenge the composition of the appeal board on due process grounds. [App. 10a.]

After considering each of these claims, the court of appeals affirmed the district court and remanded the case with instructions to "retain jurisdiction pending resolution of the state-law issues." App. 21a.

3. A. The court of appeals began its discussion of the petitioners' facial challenge to the statute by considering this Court's decision in *Chicago Teachers Union v. Hudson*, —— U.S. ——, 106 S. Ct. 1066 (1986), upon which the petitioners placed "[e]xclusive reliance." App. 11a. The court below found *Hudson* of no aid to the petitioners in this regard, noting that in this Court "*Hudson* involved not a facial attack upon the Illinois statute, but only a challenge to the procedures *actually* adopted in a specific collective bargaining agreement."

App. 11a (emphasis in original). Indeed, the *Hudson* plaintiffs' facial constitutional challenge had been rejected by the lower courts, and that ruling was not appealed to this Court. *Hudson*, 106 S.Ct. at 1072 n.6.

The court of appeals therefore relied on this Court's recent decision in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), in analyzing petitioners' facial challenge. App. 12a. The Court in *Taxpayers for Vincent* had explained that there are two different contexts in which a statute may be declared facially invalid: "either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" 466 U.S. at 796. Applying *Taxpayers for Vincent*, the court of appeals found that the New Jersey statute does not mandate procedures contrary to the requirements set out in *Hudson*, but rather is susceptible to constitutional application. App. 12a. This conclusion, as the court below noted, is buttressed by the New Jersey Supreme Court's holding in *Boonton Board of Education v. Kramer*, 99 N.J. 523, 494 A.2d 279, 292 (1985), that the representation fee statute is to be construed so as to make it consistent with constitutional requirements. The court of appeals relied also on the New Jersey Appeal Board's proposed regulations designed "[t]o satisfy the mandates of the United States Supreme Court in [*Hudson*], and the New Jersey Supreme Court in *Boonton*." App. 12a-13a. The court below found it "equally clear that the doctrine of overbreadth is not applicable here," reasoning that "[b]ecause the statute in question threatens no sanctions, there does not appear to be any question of a chilling effect on expressive activity." App. 14a.

B. The court of appeals explained its holding that the district court did not abuse its discretion by abstaining on the petitioners' as-applied claims as follows:

> Appellants' as-applied claims are based entirely upon the Supreme Court's holding earlier this year in *Hudson*. . . . The New Jersey Supreme Court has declared in *Boonton* its intention to construe the Act so as to make it consistent with constitutional requirements, *Boonton*, 494 A.2d at 292, and the New Jersey courts have not decided a case under the Act since *Hudson* was decided. An unsettled issue of state law is thus presented: What set of procedures does the state statute require to be followed in the implementation of a collectively bargained agreement to collect representation fees from nonmembers? The Act is largely silent as to the procedures to be followed in implementing it, and is therefore " 'fairly subject to an interpretation which will render unnecessary' adjudication of the federal constitutional question." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984) (quoting *Harman v. Forssenius*, 380 U.S. 528, 535 (1965)). [App. 16a-17a.]

The court below noted also that

> the appeal board has proposed a set of administrative rules implementing the Act that are designed to codify the requirements of *Hudson* and *Boonton*. Brief for Appellees at 21, app. 1-19. If these proposed rules are adopted, they may well constitute an implementation of the Act that makes applications of it comport with the restrictions set forth in *Hudson*. In such event, the need for a constitutional adjudication would be eliminated or, at the very least, its scope substantially narrowed. The state is thus embarked on a process aimed at implementing the Act in a constitutional manner. [App. 17a (footnote omitted).]

While the court of appeals found the possible delay caused by abstention to be a matter of "some concern," that court concluded that this problem was not sufficient to render the district court's decision to abstain an abuse of discretion. App. 18a. In this regard, the court of appeals noted that the district court retained jurisdiction, so that "[s]hould the appellants experience undue delay in obtaining resolution of the unsettled state-law issues,

they would have the right once again to request that the district court move forward." App. 18a.

C. The New Jersey statute requires that, in addition to a "strictly impartial" chair, the appeal board shall contain a representative of public employers and a representative of public employee organizations. N.J.S.A. 34:13A-5.6 (App. 280a). The petitioners do not allege that the members of this board have any disqualifying pecuniary interest or personalized animus. Instead, the petitioners maintain that the employer and union representatives on the board will in the nature of things be incapable of deciding cases on the merits and will constitute a voting bloc against the interests of nonunion employees. App. 20a. The court of appeals rejected that highly speculative claim of generalized bias and properly so.

The members of the appeal board sit as public officials, appointed by the Governor with the advice and consent of the New Jersey Senate, and there is nothing to suggest that they would not faithfully carry out the function with which they are charged by the statute. Indeed, there is a presumption that they will do so. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Moreover, cases coming before the appeal board are assigned to career administrative law judges by the New Jersey Office of Administrative Law, N.J.A.C. 1:20-5:1, and the decisions of the appeal board are subject to judicial review.

The cases are uniform in rejecting due process challenges to administrative tribunals based on claims of generalized bias such as that raised by the petitioners. *Withrow v. Larkin, supra* (combination of investigative and adjudicative functions in medical licensing board composed of practicing physicians); *Farm Workers v. Arizona Agriculture Employment Relations Board*, 727 F.2d 1475, 1477-79 (9th Cir. 1984) (en banc) (seven member agricultural labor board composed of two employer representatives, two union representatives, and three public

members); *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295, 299 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981) (five member board composed of two employer representatives, two union representatives, and a neutral arbitrator); *Overlook Nursing Home, Inc. v. United States*, 556 F.2d 500, 502-03 (Ct. Cl. 1977) (three member medical appeals board composed of employees of insurance company which might be interested in precedential effects of board's decisions).

The court of appeals' ruling that New Jersey's determination that objecting employees' representation fee challenges are to be decided in the first instance by a tripartite board is thus fully in accord with the developed due process law. This Court has made it plain that invalidating decision-making processes on a generalized fear of potential bias is disfavored and that only "the most extreme of cases," *Aetna Life Ins. Co. v. Lavoie*, —— U.S. ——, 106 S.Ct. 1580, 1585 (1986), justifies such a ruling. There can be no doubt that the New Jersey system is well within that constitutional line.

CONCLUSION

For the above stated reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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